

LAW AND PHILOSOPHY: FROM SKEPTICISM TO VALUE THEORY

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I. INTRODUCTION: LAW AND PHILOSOPHY

To write about philosophy and law is both odd and daunting. It is odd because the topic seems to presuppose that the two fields are separate and that philosophy may be unfamiliar to legal practice and legal practitioners. Yet, recognized or not, philosophy is part of the ordinary life of law schools and lawyers. Images of the methods of philosophy shape accounts of legal education and legal reasoning. Constitutional decisions wrestle with great philosophical issues: liberty, the marketplace, rights, justice. And constitutional consensus changes along with dominant philosophical views. Stalwart philosophical topics sit firmly on the legal landscape: free will and responsibility, duress, causation, intentionality, paternalism, and myriad others. Perhaps the most fundamental division among basic theories about the nature of law is whether the very concept of law presupposes connections to morality or to political philosophy.

The topic is daunting because it can be taken in so many directions. Philosophy itself is not a single method or discipline or topic or tradition, nor even a recognizably limited set of methods or disciplines or topics or traditions. Literally, philosophy is the love of wisdom. Philosophers ask questions, clarify meaning, and search for understanding. The practice of philosophy may appear pretentious, as in Aristophanes's caricature of Socrates in *The Clouds*;¹ politically powerful, as in John Locke's critique of the divine right of kings;² inspiring, as in St. Bonaventure's *The Mind's Road to God*;³ or deadly serious, as in contemporary bioethical discussions of health care rationing or the right to die. Traditional, central areas of philosophical inquiry were: epistemology, or the study of the

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1. ARISTOPHANES, *THE CLOUDS*, reprinted in 2 *THE COMPLETE GREEK DRAMA* 541 (Whitney J. Oates & Eugene O'Neill, Jr. eds., 1938).

2. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., student ed. 1988) (3d ed. 1698).

3. SAINT BONAVENTURE, *THE MIND'S ROAD TO GOD* (George Boas trans., Liberal Arts Press 1953).

nature and possibility of knowledge; metaphysics and ontology, or the study of the nature of the world at its most fundamental level, including the nature of being; and ethics and politics, or the study of what is good and right for individuals or societies. Philosophy has also spawned other disciplines, now developed in their own right: psychology, formal semantics, and artificial intelligence.⁴ Today philosophers are deeply involved in the questions of other disciplines: bioethics, professional ethics, philosophy of psychology, philosophy of physics, and philosophy of history, to name a few.

These relationships between philosophy and law have developed along many different lines. From the Platonic dialogues to nineteenth-century American pragmatism and beyond, philosophical work has influenced the historical development of law.⁵ Philosophical structures and methods of argument, such as the syllogism or the argument from analogy, are important tools of legal reasoning.⁶ Philosophical topics appear as problems within law: Some of the best analytic philosophy in Britain in the 1950s and 1960s was devoted to important legal topics, such as H.L.A. Hart and A.M. Honore's analysis of the concept of legal causation,⁷ or J.L. Austin's discussion of excuses.⁸ Philosophical analysis of these and other legal problems continues today.⁹

On the most abstract level, highly developed philosophical accounts have been given of the nature of law itself. These range from traditional

4. J.L. AUSTIN, *Ifs and Cans*, in PHILOSOPHICAL PAPERS 205 (J.O. Urmson & G.J. Warnock eds., 3d ed. 1979).

In the history of human inquiry, philosophy has the place of the initial central sun, seminal and tumultuous: from time to time it throws off some portion of itself to take station as a science, a planet, cool and well regulated, progressing steadily towards a distant final state. This happened long ago at the birth of mathematics, and again at the birth of physics: only in the last century we have witnessed the same process once again, slow and at the time almost imperceptible, in the birth of the science of mathematical logic, through the joint labours of philosophers and mathematicians. Is it not possible that the next century may see the birth, through the joint labours of philosophers, grammarians, and numerous other students of language, of a true and comprehensive *science of language*? Then we shall have rid ourselves of one more part of philosophy (there will still be plenty left) in the only way we ever can get rid of philosophy, by kicking it upstairs.

Id. at 232.

5. One recent American study is MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* (1992).

6. *E.g.*, Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993). Sunstein's article is an illustration of how philosophical techniques can be put to work in the study of legal reasoning.

7. H.L.A. HART & A.M. HONORE, *CAUSATION IN THE LAW* (1962).

8. J.L. AUSTIN, *A Plea for Excuses*, in PHILOSOPHICAL PAPERS, *supra* note 4, at 175.

9. *See, e.g.*, ALAN R. WHITE, *MISLEADING CASES* (1991) (arguing that courts have given misleading interpretations of concepts such as attempt, intention, knowledge, duress, and belief).

natural law theories, which hold that there are necessary connections between law and morality,¹⁰ to positivist views, which hold that the two bear no logical or conceptual relationship to one another.¹¹ Perhaps the most thoroughgoing form of positivism is the American legal realist view that the law simply is what officials say it is—whatever else might be thought about its justice or fairness.¹² A central disagreement in the traditional natural law-legal positivism debate has been whether a seriously immoral system can be law at all. Some of the more extreme natural law theorists have argued that seriously immoral legal systems—such as Nazi Germany's—are not law at all.¹³

The divide between natural law theory and legal positivism has been the stock characterization of the field of legal philosophy. Quite recently, however, scholars have questioned whether the divide is a very helpful starting point for theorizing about the nature of law.¹⁴ These scholars have shifted away from conceptual questions—such as “what is law?” and “are there necessary connections between law and morality?”—to efforts to do normative theory about law. Other critics of traditional philosophy of law, however, reject normative theory as indeterminate, as incoherent, or as masking the rationalization of privilege.¹⁵ Although I

10. E.g., SAINT THOMAS AQUINAS, *SUMMA THEOLOGICA* question 90, reprinted in *TREATISE ON LAW* (*SUMMA THEOLOGICA*, QUESTIONS 90-97) 1 (Henry Regnery Co. 1967); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (H.L.A. Hart ed., 1980).

11. E.g., JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (London, John Murray 1832); H.L.A. HART, *THE CONCEPT OF LAW* (1961); HANS Kelsen, *THE PURE THEORY OF LAW* (Max Knight trans., 1970).

12. E.g., KARL LLEWELLYN, *THE BRAMBLE BUSH* 12 (2d ed. 1951).

13. To American legal philosophers, perhaps the most familiar example of this disagreement was the debate between H.L.A. Hart and Lon Fuller over the justifiability of the Nuremburg trials. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). Hart argued that Nuremburg must be understood and justified as a moral condemnation of the accused Nazis, not as a prosecution for legal violations. Hart, *supra*, at 618. Fuller argued for a purposive understanding of law, on which at least some of the Nazi commands—those that were secret, for example—were not law. On the basis of this understanding, he challenged the idea that the Nuremburg defendants had been prosecuted for actions that were legal under Nazi law. Fuller, *supra*, at 648-57.

14. Among these scholars Philip Soper suggests starting by linking legal and political theory, and asking what constitutes a just state, what is a good legal system, and what is the basis of legal obligation. PHILIP SOPER, *A THEORY OF LAW* (1984). Frederick Schauer embeds an analysis of law in an account of the value of prescriptive rules. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991). And Roger Shiner argues that positivism and natural law theory each represent significant insights about law: Positivism emphasizes the claims of stability and settled law, and natural law theory the claims of political morality and the good society. ROGER SHINER, *NORM AND NATURE: THE MOVEMENTS OF LEGAL THOUGHT* (1992).

15. Pierre Schlag, for example, criticizes the kind of normative legal scholarship that surveys an area of the law and then makes recommendations about what doctrine ought to be

think normative writing as it occurs in law reviews and philosophy journals contains much unfortunate complacency and abstraction, I am unabashedly a normative theorist. This Essay is an effort to draw links between philosophical work in ethics and law.

Perhaps the most politically important, but also the most difficult, linkage between philosophy and law today is the extent to which law does, should, or must accommodate philosophical differences among citizens. Justice Blackmun's declaration in *Roe v. Wade* that it was unnecessary for the Court to take a position about fetal rights,¹⁶ for example, has been much maligned. Later discussions of the abortion decisions have dealt explicitly with whether the law should resolve an issue that is the subject of strong, public philosophical disagreement.¹⁷ Ronald Dworkin, among others, has taken renewed interest in the argument that the status of the fetus is a question of religious morality that ought not to be resolved by the state, but ought to be left to individual conscience.¹⁸ Abortion is not the only area of deep moral disagreement among American citizens: Euthanasia, sexual conduct, hate speech, affirmative action, and even environmental protection, are all areas in which the structure of dispute reveals moral paradigms that diverge at a very deep level.

In the midst of this diversity, my goal in this Essay is to develop some modest illustrations of how an understanding of the various kinds of connections between philosophy and law might be helpful for law and lawyers. There are, as I have said, so many connections between philosophy and law that my illustrations are bound to be arbitrary. They are, however, linked by a theme that is central to both modern law and contemporary philosophy: whether and in what ways value judgments can

accepted. He identifies this type of legal scholarship with bureaucratic avoidance of law as it actually functions and with the delegitimization of critical perspectives. Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991). Richard Delgado argues that normative discourse is utterly indeterminate:

[F]or every social reformer's plea, an equally plausible argument can be found against it. Normative analysis is always framed by those who have the upper hand so as either to rule out or discredit oppositional claims, which are portrayed as irresponsible and extreme. Normative talk is deadening—it points us off into abstraction when it is particularity and detail that kindle conscience. Normativity is a kind of oil that lubricates the shifting plates of our experience, helping us ignore our inconsistency and others' pain. . . . It does all this while enabling us to be comfortable with our roles; normativity feels good.

Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 960-61 (1991).

16. 410 U.S. 113, 159 (1973).

17. *E.g.*, RONALD DWORKIN, *LIFE'S DOMINION* (1993); KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988); LAURENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990).

18. DWORKIN, *supra* note 17.

be justified. I have chosen this theme in part because skepticism about value theory has been a major influence on American writing about the role of courts. More importantly, I also believe that the most difficult issue facing our legal system today is determining how to deal with disagreements about deeply held values—such as sexual liberty, the right to life, individual responsibility, or the treatment of ecosystems. Least modestly, I hope to illustrate that philosophy provides insight into how law should regard these value disagreements.

In the United States, unfortunately, philosophy has gotten off to a bad start for many lawyers, precisely on the issue of skepticism about values. The Socratic method has been mistaken in legal education for a kind of generalized skepticism, and it is with this mistake that I begin. I suggest that a better understanding of Socratic views about knowledge—in philosophers' terminology, "Socratic epistemology"—would help set the stage for a better understanding of value theory by lawyers. I then develop a related illustration of the historical influence of philosophy on law; the linkage between the skepticism about values of the logical positivists and the judicial neutrality advocated by constitutional theorists of the 1950s and 1960s, such as Herbert Wechsler or Alexander Bickel, and still professed by many today, such as John Hart Ely. Next, I take up philosophy's return to value theory, particularly John Rawls's development of a liberal theory of justice. Perhaps not surprisingly, Rawls's work has had almost no apparent direct influence on court decisions, but has had an enormous influence on academic legal writing. Rawls's work is a good illustration of how what philosophers do has the potential to provide useful theoretical perspectives for lawyers. I conclude with a discussion of how Rawlsian theory can provide limited but helpful guidance for courts dealing with deep conflicts over values, such as in the abortion and right to die cases.

II. SOCRATES AND SKEPTICISM

For today's generation of lawyers, Socrates is a familiar ghost. He is supposedly brought back to life in the archetypical law professors of *The Paper Chase*¹⁹ and *One L*²⁰—images that are faded by age but still powerful today. These reincarnations question students unrelentingly, teaching them to "think like lawyers" and to become accustomed to adversarial dialogue. As originally conceived by Christopher Columbus Langdell, the "Socratic" method was designed to encourage students to

19. *THE PAPER CHASE* (Twentieth Century Fox 1973).

20. SCOTT TUROW, *ONE L* (1977).

uncover for themselves the logical structure of common-law cases. Through responding to Socratic questioning, students would recognize hidden premises and chains of argument and would formulate and test legal principles against both real and hypothetical cases. Through the method, students' analytic powers were to be flexed, developed, and exercised.²¹

In the early Platonic dialogues, Socrates questioned his interlocutors in order to elicit their assumptions and values. Their answers became the objects of examination and, almost always, refutation.²² His interlocutors were all men who would be expected to be experts about the topics under discussion: for example, generals Nicias and Laches about courage,²³ or the theologian Euthyphro about piety.²⁴ To put it mildly, they did not like the results of the interrogations. Eventually, Socrates was charged with "criminal meddling, in that he inquires into things below the earth and in the sky, and makes the weaker argument defeat the stronger, and teaches others to follow his example."²⁵ Critics complain that his law professor reincarnations do the same today. They delight in making the weaker argument appear the stronger and in teaching students that argument can serve any end. In the views of these critics, Socratic teachers tear down students' deeply held values, but fail to offer them anything in replacement.²⁶ As a result students may be left generally skeptical about reasoned value justification. Alternatively, they may adopt a kind of levelling relativism: No values are better than any

21. E.g., Steven A. Childress, *The Baby and the Bathwater: Developing a Positive Socratic Method*, 18 LAW TCHR. 95 (1984). Childress, an American writing in a British journal, seeks to distinguish the good from the problematic in the Socratic method as it is used in American law schools. He characterizes the method as a "probing tool of intellectual and skills development." *Id.* at 96. It involves open scrutiny of cases, principles, law, and values. *Id.* at 106 n.5. Its problematic appendages are characterized as "teacher abuse and covert indoctrination." *Id.* at 96. For another generally favorable account of the method, which seeks its integration into legal writing classes, see Mary K. Kearney & Mary B. Beazley, *Teaching Students How to 'Think Like Lawyers': Integrating Socratic Method with the Writing Process*, 64 TEMP. L. REV. 885 (1991). Their view of the Socratic method is that its questioning drives students to understand presuppositions and the process of analysis. *Id.* at 887.

22. See, e.g., Richard Robinson, *Elenchus*, in THE PHILOSOPHY OF SOCRATES: A COLLECTION OF CRITICAL ESSAYS 78 (Gregory Vlastos ed., University of Notre Dame Press 1980) (1971).

23. See PLATO, *Laches*, in THE COLLECTED DIALOGUES OF PLATO 123 (Edith Hamilton & Huntington Cairns eds., 1961).

24. PLATO, *Euthyphro*, in THE COLLECTED DIALOGUES OF PLATO, *supra* note 23, at 169.

25. PLATO, *Socrates' Defense (Apology)*, in THE COLLECTED DIALOGUES OF PLATO, *supra* note 23, at 3, 5.

26. See Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 414-15 (1971).

others, so what is right for any individual is just what he or she believes. Thus what is "really right" changes with the perspective of the speaker.

Such relativism may be even more pernicious than skepticism. It forestalls criticism; nothing more can be said about a speaker's values than that they are deeply held. When values are widely shared, relativism is likely to mask unthinking acquiescence in dominant values. About twenty years ago, in a well-known attack on law school education, Duncan Kennedy argued that Socratic teaching, despite appearances of neutrality, presupposes ideological commitments to authority, to competitive judgments of merit, and to separations between public impassivity and private commitment.²⁷ In the worst case, Socratic teaching thus breeds a combination of cynicism and adherence to the status quo.

The historical Socrates, however, was neither a skeptic nor a relativist. Indeed, skepticism and relativism were views of the Sophists at whom Socrates directed so much of his criticism. Socrates's commitment was to virtue, which he thought both required and was produced by knowledge.²⁸ Socrates's reply to the relativists was that they lacked knowledge of what they claimed.²⁹ Why, then, the incessant questioning and apparent refutational structure of the early Platonic dialogues? Gregory Vlastos explains away the apparent paradox between Socrates's pursuit of virtue and the structure of Socratic inquiry in terms of a theory of knowledge developed from the Socratic dialogues.³⁰ Knowledge is not dogmatic certainty. It is a process of achieving justified belief, belief that can best withstand criticism at a given time, yet is always open to reexamination.

If their critics are right, the archetypical Socratic law teachers poorly reflect the Socratic pursuit of virtue. They exemplify a sophistry that can serve any end, stripped of the underlying Socratic aim. To be

27. Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (1970). Extensive feminist criticism also argues that the Socratic method models dominant values. See, e.g., *Project: Gender, Legal Education and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1220 n.76 (1988) (citing Meredith Gould, *The Paradox of Teaching Feminism and Learning Law*, 7 ALSA F. 270 (1983)). The Stanford project reports that in 1986, more male (43.7%) than female (28.5%) law graduates favored professors adept at Socratic dialogue, and that male graduates reported significantly higher levels of class participation than female graduates. *Id.* at 1239. However, these differences do not persist among current students, perhaps indicating a change in the way classes are conducted at Stanford. *Id.* at 1238.

28. Gregory Vlastos, *Introduction: The Paradox of Socrates*, in THE PHILOSOPHY OF SOCRATES: A COLLECTION OF CRITICAL ESSAYS, *supra* note 22, at 1, 6-8.

29. Terry Penner, *Socrates and the Early Dialogues*, in THE CAMBRIDGE COMPANION TO PLATO 121 (Richard Kraut ed., 1992).

30. Vlastos, *supra* note 28, at 7.

sure, the archetypes are themselves caricatures. And in today's law schools, the image of Socratic teaching seems to be at least fading around the edges and, more likely, is gradually slipping away as the generations shift. Nonetheless, it seems to me that much of the skepticism and cynicism remain. I think that a better understanding of how the Socratic method became problematic in the teaching of law would be helpful in dissipating that skepticism, and that the example of the original Socrates is instructive in this regard.

When Christopher Columbus Langdell introduced the new method of Socratic law teaching to the Harvard Law School, he did not believe he was charting a course towards skepticism. Indeed, Langdell thought that law was a science on the model of geometry, with clear principles for students to uncover.³¹ Some who doubted Langdellian certainty did so within an epistemology that allowed for reason and justification in value theory. For example, Justice Holmes directed this famous criticism at Langdellian formalism:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.³²

Although Justice Holmes has often been interpreted as a skeptic,³³ his views are more accurately placed within the pragmatist philosophical tradition of his day. Charles Sanders Peirce and other pragmatists believed that facts and values were inextricably linked, and that normative knowledge was possible through experimentation.³⁴ According to several recent interpreters, Justice Holmes shared the pragmatists' view that

31. Christopher Columbus Langdell, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* at vi (Boston, Little, Brown, & Co. 1871). Dean Langdell wrote,

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.

Id. See generally M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986) (discussing evolution of dominant legal-scientific model before Langdell).

32. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (Mark D. Howe ed., 1963) (1881).

33. *Id.* at xiii.

34. CHARLES S. PEIRCE, *The Fixation of Belief*, in *WRITINGS OF CHARLES SANDERS PEIRCE* 242, 248-49 (Christian J.W. Kloesel ed., 1986).

normative knowledge could be gained through experience.³⁵ Holmes's account of the development of legal knowledge is an example. Legal judgments about duties in particular cases precede the formation of general principles. Particular judgments are tested in light of felt convictions about the correctness of their results, and in terms of new cases. Gradually, general principles emerge, which in turn shape convictions about new cases; law develops through dynamic interaction between cases and principles.³⁶

The association between the case method and skepticism appears instead to have been forged in the wake of the positivism of the first half of the twentieth century. The logical positivists, particularly in Vienna and England in the early twentieth century, held as central tenets that statements of fact and judgments of value are logically different in kind. While statements of fact are verifiable, or at least in theory falsifiable, value judgments are not subjects of knowledge. Value judgments must instead be understood not as making truth claims, but as expressions of emotion, as prescriptions, or perhaps as simply meaningless.³⁷ Influenced by the logical positivists, by Freudian psychology, and by the moral horror of the Second World War, extreme realists such as Jerome Frank were indeed skeptical, not only of Langdell's approach, but of normative theory more generally.³⁸

Langdell's remarkable confidence in the scientific nature of law certainly invited critique. But an utter rejection of reason in normative theory is an extreme response to an extreme theory. Even Judge Frank himself held what were arguably idealist hopes for the New Deal. But these hopes remained in tension with his skepticism about judicial reasoning.³⁹ Pragmatism's commitment to experiential knowledge is a better paradigm for legal theory. There are echoes of pragmatism's experimental epistemology in Gregory Vlastos's solution to the Socratic

35. See, e.g., Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 788 (1989) (emphasizing linkages between thinking of Holmes and John Dewey); Catharine W. Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541, 579-81 (1988) (reading Holmes in terms of Peirce's pragmatism).

36. See Hantzis, *supra* note 35, at 582.

37. See A.J. AYER, *LANGUAGE, TRUTH & LOGIC* 5, 102-03 (2d ed. 1946).

38. See THURMAN ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935); JEROME FRANK, *LAW AND THE MODERN MIND* (1930); see also Martin P. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, 36 J. LEGAL EDUC. 441, 458-60 (1986) (discussing Frank's skepticism).

39. See Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J.L. & SOC'Y. 175, 176 (1991); see also Neil Duxbury, *The Reinvention of American Legal Realism*, 12 LEGAL STUD. 137, 153 (1992).

paradox—that is, that knowledge lies not in certainty but in the beliefs that best withstand ongoing scrutiny.⁴⁰ Socrates thought that the way to knowledge lay in reasoned inquiry—examination and reexamination through dialogue. This model remains useful, but unfortunately had moved to the background by the second generation of Socratic law teachers. Also consigned to the background may have been efforts to develop models for the law to deal with uncertainty, incomplete justification, and reasoned disagreement. I return to these enterprises later in this Essay.

III. VALUE SKEPTICISM AND JUDICIAL RESTRAINT

The American legal theorists who succeeded the extreme legal realists of the 1920s and 1930s did not return to theorizing about values. Instead, through a variety of procedural means, they attempted to avoid substantive dispute altogether. Perhaps the most important scholarly influence on the generation of lawyers trained after the Second World War was a manuscript developed by Henry Hart and Albert Sacks for students at Harvard Law School.⁴¹ This manuscript was widely circulated but never formally published. In it, Hart and Sacks argued that law was a means for achieving social purposes through institutional settlements.⁴² The most complex issues of institutional design are the locus of decision-making authority and the control of discretion.⁴³ According to Hart and Sacks, there is a trade-off between accountability and discretion in political institutions.⁴⁴ Decision-making structures in which discretion is extensive, such as the legislature, need to be subject to a high degree of democratic accountability.⁴⁵ Structures in which discretion is highly controlled, such as the courts, can be less immediately accountable.⁴⁶ In the legislature, decisions can take place through the weighing and compromising of policy goals, but in the courts, discretion is controlled through the reasoned elaboration of principle.⁴⁷ Judges must explain, case by case, both why they have the power to resolve the given dis-

40. I say "echoes" because Platonic ontology, with its eternal and unchanging forms, is decidedly not pragmatist.

41. Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (1958) (unpublished manuscript, available at William M. Raines Law Library, Loyola Law School); see Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413, 413 (1987) (discussing influence of manuscript).

42. Hart & Sacks, *supra* note 41, at 4-6.

43. *See id.* at 171.

44. *See id.* at 173.

45. *Id.* at 178-79.

46. *Id.*

47. *Id.* at 173.

pute—their jurisdictional authority—and how their resolution fits with other established applications of the principles they employ.⁴⁸ Hart's *The Time Chart of the Justices*, published within a year of the legal process manuscript, emphasizes the importance of principled constitutional adjudication and criticizes the Supreme Court for taking more cases than it can decide in a principled fashion.⁴⁹

The influence of Hart and Sacks can be traced through a series of important writings on constitutional adjudication that appeared from the late 1950s through the 1960s. *Brown v. Board of Education*⁵⁰ had been decided in 1954; and despite their enthusiasm for the death knell of legal segregation in education, some constitutional scholars were troubled by its constitutional basis. Could a principled rationale be articulated for *Brown*, or was the decision simply a sympathetic response to the devastating results of segregation? The *Brown* opinion was criticized because the Court built its analysis on a finding of fact—segregated schools do not provide equal educations—rather than on a constitutional foundation such as that “separate but equal” facilities violate equal protection. Writing in 1959, Herbert Wechsler advocated the device of generality to limit the Court’s use of value judgments.⁵¹ Wechsler linked the justification for judicial review to the Court’s obligation to be “entirely principled.”⁵² He wrote that “[a] principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”⁵³ For Wechsler, the problem with *Brown* was that its reasoning did not rest on more general principles, such as the freedom of association or across-the-board rejection of the separate but equal doctrine.⁵⁴ Later critics have observed that generality by itself is compatible with principles of any content; thus, the requirement is empty.⁵⁵

48. *Id.* at 172.

49. Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

50. 347 U.S. 483 (1954).

51. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

52. *Id.* at 19.

53. *Id.* For an interpretation of Wechsler as a proceduralist, see Laurence E. Wiseman, *The New Supreme Court Commentators: The Principled, the Political, and the Philosophical*, 10 HASTINGS CONST. L.Q. 315, 350 (1983).

54. Wechsler, *supra* note 51, at 32-33.

55. E.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 55 (1980).

Alexander Bickel was another constitutional scholar who relied on process to articulate a theory of judicial review.⁵⁶ Bickel criticized the apparent result orientation of the realists and the nihilism of their most extreme adherents, and praised Hart's emphasis on principled articulation in *The Time Chart of the Justices*.⁵⁷ Like Wechsler, Bickel emphasized the importance of judicial neutrality; but, unlike Wechsler, Bickel also believed that the Court should stay out of cases that it was not institutionally suited to decide, even when a principled rationale was available for the decision.⁵⁸ Thus, Bickel advocated the "passive virtues"—devices such as the doctrines of jurisdiction, standing, ripeness, or the political question doctrine—to allow the Court to withhold ultimate constitutional judgment.

Despite Bickel's contention that these doctrines of restraint could also be given a principled defense, his critics argued that they represented grave concessions to expediency. For example, Gerald Gunther wrote that "Bickel's 'virtues' are 'passive' in name and appearance only: a virulent variety of free-wheeling interventionism lies at the core of his devices of restraint."⁵⁹ In his later writings, Bickel himself embraced a Burkean conservatism as the only way to give an account for the role of the Court.⁶⁰ The extent to which doctrines of judicial restraint conceal unarticulated value judgments remains a heated topic of discussion today, as illustrated by the confirmation hearings on the nomination of Judge Robert Bork to the Supreme Court.⁶¹

Perhaps the most successful recent advocate of judicial restraint by means of process theory is John Hart Ely. Ely rejects the emptiness of neutral principles and the relativity of Bickel's ultimate traditionalism, along with philosophical reasoning more generally, as sources for the courts to use to articulate fundamental values.⁶² About the ability of the courts to use moral philosophy as a basis for deciding cases, Ely is scathing:

The basic idea thus seems to be that moral philosophy is what constitutional law is properly about, that there exists a correct

56. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986) (originally published in 1962).

57. *Id.* at 27 (referring to Hart's idea that Supreme Court is "predestined . . . to be a voice of reason").

58. Harry H. Wellington, *Foreword* to BICKEL, *supra* note 56, at ix-x.

59. Gerald Gunther, *The Subtle Vices of the Passive Virtues—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 (1964).

60. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 11-25 (1975) (discussing views of Edmund Burke).

61. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990).

62. See ELY, *supra* note 55, at 59-60, 71-72.

way of doing such philosophy, and that judges are better than others at identifying and engaging in it. Now I know lawyers are a cocky lot: the fact that our profession brings us into contact with many disciplines often generates the delusion that we have mastered them all. But surely the claim here cannot be that lawyers and judges are the best imaginable people to tell good moral philosophy from bad: members of the clergy, novelists, maybe historians, to say nothing of professional moral philosophers, all seem more sensible candidates for this job.⁶³

Ely adds the skeptical observation that the problems lie not only with the questionable ability of lawyers to do philosophy, but also with the assumption that there is a preferred method of philosophy.⁶⁴ He then argues for restraint: that the Court may step in to correct legislative errors of process but not of substance.⁶⁵ Relying on Justice Harlan Fiske Stone's famous footnote,⁶⁶ Ely concludes that the Court may act to protect discrete and insular minorities, isolated from the political process, or to correct other structural errors of representation.⁶⁷ But the Court may not act to correct legislative judgments that it believes are simply wrong, such as Connecticut's prohibition of the use of contraceptives, or Texas's restrictions on abortion.⁶⁸

Since its publication in 1980, Ely's book has stood as a landmark effort to separate process from substance in a theory of adjudication. Ely's work has been particularly troubling for liberals, because Ely himself shares many of the political persuasions of liberals, and because he has dissociated himself from "original intent"⁶⁹ theorists and their generally conservative aims.⁷⁰ Ely's critics have argued, however, that the separation between process and substance cannot be neatly drawn, and that much of what is characterized as process-based adjudication actually relies on substantive commitments. For example, Daniel Ortiz points out the range of judgments that are involved in characterizing not only blacks, but other burdened groups such as women, aliens, or gays and lesbians, as "discrete and insular minorities."⁷¹ Other critics have at-

63. *Id.* at 56.

64. *Id.* at 57-58.

65. *Id.* at 73-74.

66. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

67. ELY, *supra* note 55, at 75-77, 86-87.

68. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (arguing that *Roe v. Wade* lacked constitutional foundation).

69. ELY, *supra* note 55, at 12-13.

70. See, e.g., Frederick Schauer, *The Calculus of Distrust*, 77 VA. L. REV. 653, 656 (1991).

71. Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 727, 738 (1991).

tacked Ely's fundamental reasons for preferring process to substance. Frederick Schauer, for example, questions Ely's distrust of the countermajoritarian character of courts.⁷² Schauer argues that the extent to which we trust process values is a function of how we think the process is working. If we think the process is working relatively well, it seems risky to venture forth into substantive areas that might, with different actors, be decided differently. If we think the process is making important moral mistakes, however, "the comparative virtues of process may be less clear."⁷³

Despite its variety and appeal, the retreat to process has thus proved unsatisfactory in many ways. And while the debate about process has continued, the Court has decided issues of enormous importance to the lives of citizens. The Court has ruled, for example, that gay men do not have a fundamental constitutional right to engage in acts of consensual sodomy.⁷⁴ We may assume for the sake of argument that competent adults have a constitutional right to decline unwanted medical care.⁷⁵ Women have a constitutional right to choose to have an abortion before fetal viability, a right that the state may not unduly burden.⁷⁶ These and many other decisions have proven enormously controversial because they involve moral issues that are deeply divisive in American society. How should the Court decide when to intervene in such cases of deep moral controversy? And can philosophy provide any guidance?

IV. THE RAWLSIAN EXAMPLE

The disarray of substantive moral theory was an important factor in the retreat to process just described.⁷⁷ From the 1930s to the 1960s Anglo-American academic philosophy, heavily influenced by positivism, largely rejected any serious work in normative theory. In the wake of the dominance of logical positivism, moral philosophy dealt with what were called questions of "metaethics"—questions, for example, about the logic of moral language or the meaning of moral terms. It was thought that these questions admitted of clear answers, unlike questions about right and wrong or the justification of such substantive judgments. The dominant view was that normative claims are noncognitive: They appeal

72. Schauer, *supra* note 70, at 657.

73. *Id.* at 666.

74. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

75. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 279 (1990).

76. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992).

77. *See, e.g., ELY, supra* note 55, at 57-58.

to emotion, they persuade, or they prescribe.⁷⁸ Thus, there are no rational standards for settling moral disagreements. We may direct all of our persuasive talents against Adolph Hitler, but have no particular claim to reasoned argument against him, much less to a demonstration that he was grievously wrong.

By the late 1960s, however, academic philosophy was beginning to return to normative ethical and political theory. The political context was the civil rights movement and the protests against the war in Vietnam. Perhaps the most notable signal of the return to normative theory⁷⁹ was the work of John Rawls, particularly the publication in 1971 of *A Theory of Justice*.⁸⁰ My focus on Rawls's work here reflects its originality and centrality; there has, of course, been much other important work in value theory since its initial publication.

In *A Theory of Justice*, Rawls developed and defended an extended version of liberal theory. This theory elaborated two basic principles of justice and developed a framework for their justification.⁸¹ The two principles were roughly egalitarian, but permitted inequalities when they work to the benefit of all. Specifically, Rawls's first principle required everyone to have equal basic liberties, compatible with like liberties for all. It had priority over the second principle, that social and economic inequalities were unjustified unless they work to the advantage of all, and are attached to positions and offices open to all. These two principles were of immediate appeal to legal scholars interested in issues of individual liberty⁸² and economic justice.⁸³ They continue to be used today to support arguments for enhanced social equality in areas such as health care reform⁸⁴ or the interpretation of the Americans with Disabilities Act.⁸⁵

78. See R.M. HARE, *THE LANGUAGE OF MORALS* (1952); CHARLES L. STEVENSON, *ETHICS AND LANGUAGE* (1944).

79. See, e.g., ROBERT L. ARRINGTON, *RATIONALISM, REALISM, AND RELATIVISM: PERSPECTIVES IN CONTEMPORARY MORAL EPISTEMOLOGY* 5 (1989).

80. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

81. *Id.* at 60-65.

82. E.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 149 (1977).

83. See, e.g., Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). These highly influential articles utilized papers of Rawls that appeared before the publication of *A Theory of Justice*.

84. E.g., NORMAN DANIELS, *JUST HEALTH CARE* (1985).

85. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 29, 42, and 47 U.S.C.); see W. Robert Gray, *The Essential-Functions Limitation on the Civil Rights of People with Disabilities and John Rawls's Concept of Social Justice*, 22 N.M. L. REV. 295 (1992) (explaining that Americans with Disabilities Act is aimed at providing disabled

Rawls called the framework for justifying these two principles the "original position."⁸⁶ The original position was a thought experiment in which individuals were to ask what principles of justice they might choose if they were rational but behind the "veil of ignorance"—that is, deprived of knowledge of their own individual and social circumstances. Rawls's argument was that individuals in the original position would choose to guarantee themselves the best minimum position by ensuring basic liberties and protecting the situation of the least well off.⁸⁷

There are, of course, enormous difficulties with Rawls's complex and ambitious theory. To take a current problem, are the least well off to be defined in terms of economic circumstances, socio-physical circumstances such as disability, or a combination of factors? Rawls argued that the original position was the perspective from which moral principles should be adopted, because it stripped individuals of information about themselves that was "arbitrary" from a moral point of view.⁸⁸ Inequalities of genetic endowment, or of parental economic status, are not within the individual's control, and should not be part of our selection of the principles of justice that are to govern us all. An early critic of Rawls, Robert Nozick, argued that Rawls's original position allowed far too little weight to entitlements based on original acquisition or legitimate transfer of property.⁸⁹ Nozick's underlying concern was that Rawls allowed far too little scope (for a liberal) to individual freedom and desert. Later, more communitarian critics have argued that the Rawlsian conceptualization strips human beings of the personal projects and relationships that are central to self-definition.⁹⁰

At its core, Rawls's defense of both the original position and its two principles rests on a view about the nature of moral reasoning. Moral views develop, Rawls argued, as "considered judgments in reflective equilibrium."⁹¹ The original position captures the idea that we should not be able to design the world to our advantage.⁹² But it is not to be regarded as a set of foundational first principles from which particular principles are to be derived; rather, the original position represents "reasonable stipulations to be assessed eventually by the whole theory to

Americans with fundamental equality, which is necessary for social justice under Rawls's theory of "justice as fairness").

86. RAWLS, *supra* note 80, at 17-22.

87. *Id.* at 144.

88. *Id.* at 12.

89. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 198-204 (1974).

90. *See, e.g.*, MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

91. RAWLS, *supra* note 80, at 51.

92. *Id.* at 18.

which they belong.”⁹³ The two principles, and their iterations through levels in which fundamental constitutional structures, laws, and adjudicative determinations are chosen, are tested in light of our provisional judgments about particular cases.⁹⁴ These judgments may be revised in light of the theory—or, they may in turn lead us to reassess theoretical commitments. Moral theory works back and forth, from theory to intuitions, achieving and reaching coherence.

Rawls’s notion of reflective equilibrium has been understood in many different ways. Sunstein’s summary is a good one:

We might accord greater or lesser weight to particular situational judgments or to intermediate-level principles; make different decisions about what counts as a distortion of judgment; stress or downplay the role of philosophical arguments; evaluate in different ways the appropriate or possible amount of congruence between the general and the particular; bring to bear a few general theories or a large number; reject or value apparently emotional reactions; and counsel deference or indifference to very high-level theories.⁹⁵

Significant criticisms of any of these variations include whether theory can be separated from judgments in particular cases in the way the methodology suggests, whether the methodology puts too much weight on intuitions that mirror the status quo, and whether any coherentist view permits adequate critique of existing institutions.

Over the years Rawls himself has gradually changed his views about the status of moral theorizing. He attributes the change to the recognition that any theory of justice must account for fundamental moral disagreements among actual citizens. Our considered judgments in reflective equilibrium will be shared to an extent that is limited at best. As Rawls puts the point:

A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines. No one of these doctrines is affirmed by citizens generally. . . . Political liberalism assumes that, for political purposes, a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of

93. *Id.* at 578.

94. *Id.* at 200.

95. Sunstein, *supra* note 6, at 751 (footnote omitted); see Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256 (1979).

human reason within the framework of the free institutions of a constitutional democratic regime.⁹⁶

Rawls views the fundamental problem of liberal theory in actual societies as the accommodation of the values of justice and stability among those with different, but reasonable moral views: "How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?"⁹⁷

Since the publication of *A Theory of Justice*, Rawls has developed a complex and multileveled answer to the tensions among justice, stability, and pluralism. He continues to believe that the basic principles of justice must be worked out in a "freestanding" manner, independent of people's knowledge of their particular conceptions of the good.⁹⁸ But these principles are to be tested as political, not metaphysical, doctrines. A political conception of justice must be sufficiently stable. In a pluralist society this means that it must be a conception of justice on which there is an overlapping consensus of endorsement from a variety of reasonable points of view. Such an overlapping consensus is not a mere compromise or temporary accommodation that might be undone by changes in dominant political views, an accommodation which Rawls calls a *modus vivendi*.⁹⁹ It is instead a consensus that can be accepted as reasonable from the points of view of a variety of reasonable doctrines. In Rawls's view, political philosophy is thus largely detached from other areas of philosophy, such as epistemology or philosophy of religion. It incorporates as a theory of the good only the shared commitment to the equality of free, rational persons, and to the goods needed to affirm that equality. Rawls refers to this limited group of goods as primary—goods such as basic liberties and the social bases of self-respect.¹⁰⁰ The Rawlsian theory of justice thus does not take sides on such questions as whether heterosexual or homosexual relationships can be part of the good life, or what kind of quality of life is of value to the individual who lives it, or even what kind of knowledge we can have about such issues. Instead, Rawls's theory reaches only to basic social structures that can be the subject of an overlapping consensus among those who hold quite different views about sexual relationships or the quality of life. Public dialogue and action should be aimed at this overlapping consensus and not at the furtherance

96. JOHN RAWLS, *POLITICAL LIBERALISM* at xv-xvi (1993).

97. *Id.* at xviii.

98. *Id.* at 140.

99. *Id.* at 145, 170-71.

100. *Id.* at 180.

of comprehensive world views that are not generally shared. Thus, according to Rawls, a just and stable legal system would protect diversity on such matters as sexual orientation or abortion at least through early stages of pregnancy.¹⁰¹ Accordingly, *Roe v. Wade*¹⁰² and *Planned Parenthood v. Casey*¹⁰³ were just decisions; *Bowers v. Hardwick*¹⁰⁴ was not. Thus, although Rawls does not share with the process theorists the belief that all substantive commitments can be avoided, he does share the belief that politics must accommodate some normative dispute.

Rawls's theory in general and his discussions of particular social issues have been of enormous interest to academic legal writers. There are literally thousands of law review articles that use Rawlsian theory to analyze concrete legal problems along roughly liberal and egalitarian lines.¹⁰⁵ It is impossible to determine how influential these articles have been on actual legal practice. Despite its stature among philosophers and legal academics, however, Rawls's work appears to have had almost no direct influence on courts. His work has never been cited by the United States Supreme Court, unlike John Stuart Mill's defense of liberty which was cited as early as 1887¹⁰⁶ and continues to draw reference in more contemporary constitutional disputes.¹⁰⁷ There are a few scattered references to Rawls's writing in appellate cases, such as in support of the view that the indigent have a right to psychological assistance in commitment proceedings¹⁰⁸ or the view that the doctrine of employment-at-will should not allow an employer to fire an employee whose pension rights are about to become vested.¹⁰⁹ Apart from these scattered references, there is a line of dissenting opinions from Missouri that attempts to use Rawlsian discussions of fairness to analyze how to calculate tort recoveries.¹¹⁰ Because *A Theory of Justice* appeared over twenty years ago,

101. *Id.* at 243 & n.32.

102. 410 U.S. 113 (1973).

103. 112 S. Ct. 2791 (1992).

104. 478 U.S. 186 (1986).

105. See, e.g., Robert P. Burns, *Rawls and the Principles of Welfare Law*, 83 NW. U. L. REV. 184 (1989); David G. Carlson, *Philosophy in Bankruptcy*, 85 MICH. L. REV. 1341, 1343 (1987); Stephen M. Griffin, *Reconstructing Rawls's Theory of Justice: Developing a Public Values Philosophy of the Constitution*, 62 N.Y.U. L. REV. 715 (1989).

106. *Mugler v. Kansas*, 123 U.S. 623, 632 (1887).

107. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 467 (1972) (Rehnquist, J., dissenting).

108. *Goetz v. Crosson*, 967 F.2d 29, 39 (2d Cir. 1992) (Newman, J., concurring).

109. *K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1368 & n.4 (Nev. 1987).

110. E.g., *Jensen v. ARA Servs., Inc.*, 736 S.W.2d 374, 381-82 (Mo. 1987) (Welliver, J., dissenting); *Barnes v. Tools & Mach. Builders, Inc.*, 715 S.W.2d 518, 523-24 (Mo. 1986) (Donnelly, J., dissenting); *Lippard v. Houdaille Indus.*, 715 S.W.2d 491, 500 (Mo. 1986) (Donnelly, J., dissenting).

this is not a very encouraging list for those who might hope to find major philosophical developments having an impact on the law.

But I do not think that such direct incorporation is how we ought to expect philosophical developments to find their way into law.¹¹¹ We should not try to take philosophy into legal decision making on the immediate substantive level by telling judges they ought to be philosophers. Rather, philosophy finds its relevance on the level of serious thinking about dispute and justification. In order to consider when law should intervene in the lives of citizens, it matters that we have a good idea of the nature and character of disputes among citizens. Rawls's theory represents a way of thinking about the role of law in a democratic society that is a useful corrective to the skepticism about values that drove process theorists to advocate judicial restraint. Rawls's most recent work on justice and stability suggests that differing conceptions of the good should not be incorporated into law unless they are the subject of an overlapping consensus of public reason.¹¹² This constraint respects the equality of citizens with different, but reasonable points of view. Rawls applied this constraint quite directly to judicial decision making: "Public reason applies especially to the judiciary in its decisions and as the one institutional exemplar of public reason."¹¹³

Moreover, in order to consider when judicial review of legislative intervention is appropriate, we need to determine how well the political process is protecting this conception of the equality of citizens.¹¹⁴ Along these lines Samuel Freeman has developed a Rawlsian account of judicial review, in reply to John Hart Ely and others.¹¹⁵ According to Freeman the central problem in justifying judicial review is not that it is anti-majoritarian. The problem is instead that judicial review represents a conflict between protection of individual rights and the participation, through legislation, of citizens in the decisions that affect their lives. To assess whether judicial review is or is not consistent with democracy, Freeman constructs a Rawlsian constitutional convention, and asks whether free and equal sovereign individuals would choose institutions

111. *But see* Wiseman, *supra* note 53, at 317 (arguing that Rawlsian theory has directly influenced views of some constitutional commentators).

112. RAWLS, *supra* note 96, at 174-76, 247.

113. *Id.* at 252-53.

114. *See* Schauer, *supra* note 70, at 658-59.

115. Samuel P. Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 LAW & PHIL. 327 (1990-1991). Freeman's paper won the biannual 1990-1992 Berger Memorial Prize of the American Philosophical Association for the best paper in philosophy of law.

that include judicial review.¹¹⁶ He argues that judicial review would be adopted as part of a shared precommitment to protecting the equal rights of democratic sovereignty. In Freeman's view the justification for judicial review is thus strategic: It depends on whether or not we have good reason to think that legislative processes will correct themselves, or whether judicial correctives are necessary for guaranteeing equal treatment of citizens.¹¹⁷

Thus Rawlsian theory suggests two basic views about the role of law. First, law should not intervene to impose views of the good life on citizens who hold different, but reasonable, conceptions of the good; instead, law should protect the goods and the bases of self-respect required for these different lives. Second, the justification of judicial review lies in the need for intervention to correct legislative misjudgment and to protect the equal bases of self-respect among citizens.

V. MORAL PHILOSOPHY AND LAW

On the Rawlsian account just developed, philosophy helps in understanding the basic framework of justice, the character of moral dispute, the extent to which there is overlapping consensus, and the means by which legal institutions maintain basic equality among citizens. Rawls's views are neither skeptical nor absolutist about values; instead, in true liberal fashion, he seeks to construct a framework within which different conceptions of the good can flourish. But there are notorious difficulties with this theory, even as it has developed in recent years. Several of these difficulties are particularly important to understanding the role of law in relation to deep moral disputes among citizens.

First, Rawls links stability to overlapping consensus among those with different, but reasonable, conceptions about justice and the good society.¹¹⁸ He claims that reasonableness is not a strong normative notion; it means only a willingness to cooperate and to adopt policies that can be justified to those with differing points of view.¹¹⁹ Rawls describes reasonableness in the following mild terms: "The only comprehensive doctrines that run afoul of public reason are those that cannot support a reasonable balance of political values."¹²⁰ Yet the extent to which Rawlsian notions such as reasonableness—or, more obviously, the theory of

116. *Id.* at 343-44.

117. *Id.* at 354-55.

118. RAWLS, *supra* note 96, at 38-39.

119. *Id.* at 253.

120. *Id.* at 243.

primary goods—conceal significant value judgments, has been an ongoing subject of criticism.

The problem of abortion is an excellent example. To his description of reasonableness, Rawls appends a footnote that suggests that three important political values are at issue in the abortion debate: the due respect for human life, the ordered reproduction of society, and the status of women as equal citizens. From a balance of these values, Rawls reaches the conclusion that any comprehensive doctrine that prohibits abortion in the first trimester would not be reasonable.¹²¹ But abortion opponents who believe that respect for human life is not subject to compromise in this way would disagree with the reasonableness of this conclusion. Rawls's reply is that such opponents are unreasonable because of the way in which they reject compromise; but their precise point is that others are unreasonable not to recognize that human life has value that does not permit compromise. Whether or not their underlying view is plausible—and it is not my view—it is clear that abortion opponents would be correct in pointing out that the Rawlsian notion of reasonableness puts compromise and dialogue above other deeply held values.

Rawls would not dispute the claim that his version of liberal theory is committed to the values of compromise and moral dialogue, and that notions such as reasonableness embody that commitment. In his view reasoned pluralism—a pluralism that lets diverse but reasonable lives flourish—is the essence of liberalism. But the effort to specify this reasoned pluralism brings to the fore a second major difficulty with Rawls's work. Reasoned pluralism works best for the classical issues of "negative freedom,"¹²² issues that let individuals with different points of view go their own ways without interfering with one another. Issues of interdependence among individuals, however, do not afford such noninterventionist solutions.

Abortion once again is a good example. A policy of nonintervention permits women who encounter unwanted pregnancies to bear them to term, or to seek abortions, as they choose. But the policy does not guarantee success in the search. Women wanting abortions may be unable to find health care providers willing to perform them, or they may be unable to pay the price. They cannot effectuate their choices by simply going their own way, but are dependent on the willingness of others to cooperate in their plans. Negative freedom permits the choice of abortion; positive freedom enables action on that choice. This is exactly the

121. *Id.* at 243 n.32.

122. *See, e.g.,* ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 121-31 (1969).

distinction drawn by the Supreme Court in affirming the Hyde Amendment's¹²³ prohibition of federal funding for abortions. In *Harris v. McRae*,¹²⁴ the Court said outright that the constitutional right of liberty does not guarantee the means to act on one's choices.¹²⁵ But the result is inequality among lives: Women who choose abortions, but lack the means to obtain them, are less able to implement critical life choices than women who have the means to obtain them. Similarly, poor women who choose to bear pregnancies to term but who cannot pay for health care are significantly worse off in carrying out their choices than are women with means.

Rawls's second principle is an important step toward a solution to this difficulty. Rawls envisions reasoned pluralism against a background of the just distribution of resources. Therefore, poor women would not be left without the resources to obtain abortions, should they choose to have them. This more general commitment to social justice avoids the direct conflict attacked by the Hyde Amendment. Social resources should not be earmarked for abortions directly. Rather, the resource transfers which occur are aimed at enabling each person to enjoy the minimal bases of self-respect. On this basis, individuals may then pursue different, but reasonable, choices.

This use of Rawls's second principle suggests further guidelines about the role of law in the face of moral disagreements among citizens. Legislative initiatives will be needed to improve justice in the distribution of resources. But these initiatives should not undermine reasoned pluralism. Legislative efforts at redistribution should be consistent with different, but reasonable, lives. When legislative efforts at redistribution misfire so significantly that they interfere with the equal rights of citizens, then judicial review is appropriate.

Abortion once again is an example. As of this writing, the federal government is working to develop a plan for a more just distribution of health care resources. This effort is part of the more general goal of creating the background conditions of social justice.¹²⁶ As this effort continues, it should do so in a manner that does not undermine reasoned pluralism. Thus the general effort to increase justice in the distribution of health care should not incorporate provisions aimed at precluding choices about which there is reasonable disagreement. If there are such prohibitions that reach the point of violating rights—as a prohibition on

123. Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979).

124. 448 U.S. 297 (1980).

125. *Id.* at 315-18.

126. See DANIELS, *supra* note 84.

abortion funding within the context of a national health care program would do—judicial review would be appropriate.

To be sure, problems remain with this Rawlsian approach to the role of law and judicial review. It certainly will not convince those who reject any form of reasoned pluralism, or those who think that any effort to develop normative theory cannot be justified. I present it here as an illustration of how it is possible to develop plausible normative models of the role of law in the face of important moral disagreement among citizens. Philosophy reminds us that the enterprise is possible and worthwhile, not that it is always successful or complete.